Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

TRINIDAD BUSTOS,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether any interpretation of a veteran benefits statute or regulation must be interpreted by a reviewing court in the veteran's favor, pursuant to this Court's holdings in *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991) and *Brown v. Gardner,* 513 U.S. 115 (1994).

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

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The opinion of the Court of Appeals for the Federal Circuit is published as 179 F.3d 1378 (1999) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Bustos v. West* is an unpublished opinion cited as 1998 WL 199803 and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 16, 1999.

PROVISIONS INVOLVED

38 U.S.C. § 5109A. Revision of decisions on grounds of clear and unmistakable error.

(a) A decision by the Secretary under this chapter is subject to revision on grounds of clear and unmistakable error. If evidence establishes the error, the decision shall be reversed and revised.

(b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

(c) Review to determine whether clear and unmistakable error exists in a case may be instituted by the

Secretary on the Secretary's own motion or upon request of the claimant.

(d) A request for revision of a decision of the Secretary based on clear and unmistakable error may be made at any time after the decision is made.

(e) Such a request shall be submitted to the Secretary and shall be decided in the same manner as any other claim.

38 C.F.R. 3.105(a)

Error. Previous Determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of Sec. 3.500(b)(2) will apply.

STATEMENT OF THE CASE

The Appellant sought an interpretation of the meaning of "clear and unmistakable error" ("CUE") as provided in 38 C.F.R. § 3.105(a) and 38 U.S.C. § 5109A. In interpreting the regulation, the Court of Appeals for the Federal Circuit ("Federal Circuit") upheld the Court of

Appeals for Veteran Claims' ("CAVC") interpretation of CUE, which provided that in order to prove the existence of CUE as set forth in 38 C.F.R. § 3.105(a), a claimant must establish that an outcome-derivative error occurred, that is, an error that would manifestly change the outcome of a prior decision.

In affirming the CAVC's interpretation of CUE, the Federal Circuit construed the regulation in the government's favor and against the veteran. In making such a decision, the Federal Circuit violated this Court's mandates regarding interpretation of veteran benefits laws when it failed to comply with *King* and *Gardner*.

The Federal Circuit decision by omission misconstrues this Court's holdings in *King, supra,* and *Gardner, supra,* which stand for the proposition that all veteran benefits statutes and regulations are to be construed in the veteran's favor and any interpretation to the contrary is invalid.

REASONS FOR GRANTING THE WRIT

The Federal Circuit failed to properly interpret 38 C.F.R. § 3.105(a) by failing to utilize the appropriate canons of construction for veterans statutes and regulations as articulated by this Court in *King* and *Gardner*. It is difficult to ascertain from the opinion below exactly what method or procedure was utilized by the Federal Circuit in interpreting 38 C.F.R. § 3.105(a). The opinion does not cite to any authority for the process utilized by the Panel. The opinion refers to the language of the regulation and

to the CAVC's conclusions about its meaning, but offers little guidance regarding their method of construction.

What is conspicuous by its absence in the Federal Circuit opinion is the lack of citation to the only two Supreme Court decisions issued after the passage of the Veteran's Judicial Review Act, specifically *King* or *Gardner*. The opinion contains no citations to any precedential authority regarding the canons of construction. The Federal Circuit merely decided that they read the regulation the same way the CAVC did, and therefore they affirmed. This is an abrogation of their mandate from Congress. This is an abandonment of their role in the veteran benefits adjudicatory scheme. This is not an interpretation of 38 C.F.R. § 3.105(a) as mandated by *King* and *Gardner*.

In this case the CAVC interpreted 38 C.F.R. § 3.105(a) and the Federal Circuit affirmed that interpretation without examining the CAVC's interpretation in terms of *King* and *Gardner*. The Appellant contends that *King* and *Gardner* require an "examination" of the challenged interpretation in terms of whether the challenged interpretation is favorable to the interests of the veteran or is favorable to the interests of the government. If the challenged interpretation favors the government, it must be rejected by the reviewing court and a pro-veteran interpretation required as the only acceptable interpretation of that regulation or statute.

Congress provided a veteran with a right to seek statutory and regulatory interpretations from the Federal Circuit. In fact, statutory and regulatory interpretation is the only review the Federal Circuit may undertake relating to veteran benefits claims, other than constitutional

challenges. As such, the Federal Circuit's misunderstanding of this Court's holdings in *King* and *Gardner* has a profoundly injurious impact upon every veteran who seeks judicial review and is inconsistent with the Federal Circuit's role in the veterans benefits adjudication process, and undermines the unique nature of the veterans benefits scheme as created by Congress.

In the opinion at issue in the present writ, the Federal Circuit was asked to interpret 38 C.F.R. § 3.105(a). The Federal Circuit has affirmed an interpretation of that regulation in the government's favor by requiring a "manifestly different outcome" for the existence of clear and unmistakable error "CUE", even though no such requirement is explicitly stated in the regulation. Such a decision clearly misunderstands this Court's holding in *King* and *Gardner*, which provide that a reviewing court must construe all veterans benefits laws in the veteran's favor, regardless of any ambiguity.

In the context of CUE claims, the interpretation of the CAVC, as affirmed by the Federal Circuit, favors the government by protecting and insulating the prior decisions of the Agency from CUE review. It does so by creating a predicate showing imposed upon the veteran to "demonstrate by evidence a manifestly different outcome." Such an interpretation is anti-veteran, because it imposes a burden upon the veteran that is practically impossible for a veteran to meet. Such an interpretation favors the interests of the Agency in preventing CUE review of previously denied claims. The Appellant asserts that a "veteran friendly" interpretation must facilitate CUE review, not prevent it. An interpretation of the CUE regulation should be one in the light most favorable to

allowing for CUE review not denying it. The mandates of *King* and *Gardner* require the interpretation to favor CUE review rather than discourage it. CUE review should be interpreted as prophylactic and protective in nature, ensuring the integrity of the veteran benefit decisionmaking process as opposed to rendering it untouchable.

In *King v. St. Vincent's Hospital, supra,* this Court was asked to interpret 38 U.S.C. § 2024(d), a provision of the Veteran's Reemployment Rights Act that provides reemployment rights to service personnel. The petitioner's employer argued that the statute must be interpreted to provide reemployment rights after reasonable tours of duty, but not for a period of three years as contemplated by the petitioner.

In interpreting the statute, this Court first held that the statute was completely silent as to any durational limits to be placed on the protection it provided. *Id.* at 218. The Court further held that the employer's interpretation of the statute, as based upon language contained in other provisions of the statute would not be granted any interpretive significance in light of the canon "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favors." 502 U.S. 220, at fn. 9. Accordingly, the Court held that the statute placed no durational limits on the petitioner's reemployment rights.

This Court clearly held that veteran benefits statutes are to be construed in the veteran's favor. The Court's holding did not provide for a review of the "plain meaning"; it did not provide for a threshold ambiguity requirement before the provision can be construed in the

veteran's favor. Instead, the Court held that the laws are to be construed in the beneficiaries' favors.

This holding is clearly in keeping with the purpose behind the veteran benefits laws which were created by Congress with the express intent to benefit the veteran. The Federal Circuit, itself, has recognized that the veteran benefits statutes are "strongly and uniquely pro-claimant." *See Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). Further, in enacting the laws regarding veteran benefits entitlement, Congress created a *sui generis* scheme for "awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998).

This Court's holding in *King* is clearly in keeping with the Congressional purpose of the veteran benefits laws. Meaning, that if the purpose of the veteran benefits laws is to benefit the veteran, then it naturally follows that such laws should always be construed in the light most favorable to the veteran's interests, without first requiring a reviewing Court to evaluate the plain meaning of a statute or regulation or for ambiguity.

This Court's mandatory canon of construction was again recognized in *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving statutory interpretation of a disability benefits provision. The government, in denying benefits to a veteran, asserted that 38 U.S.C. § 1151 imposed a fault requirement on the government in order for it to be liable for benefits. The Court first held that the statute's plain language contained absolutely no mention of a fault

requirement, and that the government's implicit interpretations of a fault requirement could therefore only be entertained under the guise of ambiguity. The Court, citing *King*, concluded that **even then**, such an argument would not prevail because such an ambiguity would have to be resolved in the veteran's favor.

However, reading *Gardner* and *King* in conjunction reveals that there is no ambiguity requirements in either of the Court's holdings nor a requirement to review for "plain meaning." In *Gardner*, the Court merely held that even if the government could prove the existence of an ambiguity in the statute, the government's interpretation of the statute would not prevail since the statute must be construed in the veteran's favor. In *King*, the Court quite simply held that veteran benefits statutes are to be construed in the veteran's favor. As such, there is no plain meaning or ambiguity requirement imposed upon the Court's mandatory canon of construction that the benefits provisions are to be construed in a veteran's favor.

In the present case, the Federal Circuit was asked to interpret a regulation that contained no explicit language supporting the government's contention that CUE requires a "manifestly different outcome". Instead of employing this Court's mandatory canons of construction, the Federal Circuit interpreted the regulation **against** the veteran and in the government's favor by adopting the interpretation of the CAVC. As such, the veteran was denied the benefit of this Court's only two cases regarding construction of veteran benefits statutes, as well as the benefit of the pro-claimant nature of the veteran benefits adjudication system as created by Congress.

The Federal Circuit's failure to apply this Court's mandatory canons of construction, as they relate to veteran benefits laws is egregious in light of the obvious benefit it deprives the veteran. Currently the **only** statutory or regulatory procedure available to a veteran to collaterally attack a previously final Agency decision is 38 U.S.C. §§ 5109A and 7111 and 38 C.F.R. § 3.105(a). This procedure attempts to ensure that there had been a fair prior adjudication of his claim. It is the clear and evident purpose of these statutes and regulations to guarantee the integrity of the Agency's decisionmaking process. However, the Federal Circuit has made both the statute and regulation a nullity by their "pro-government" interpretation effectively preventing the veteran from ever benefiting from the use of either statute or regulation.

By requiring the veteran to prove a substantially different outcome, the Federal Circuit essentially deprives all veterans from judicial review of any prior unappealed Agency decisions. In essence, the Federal Circuit's interpretation of the CUE statute and regulation makes a readjudication virtually impossible since the veteran must prove a "manifestly different outcome." Clearly, such an interpretation deprives the veteran of the benefits of the CUE statutes and regulation and completely undermines the pro-claimant nature of the veteran benefits adjudication system, effectively shifting the burden to the veteran and away from the government.

The Federal Circuit's failure to interpret the CUE regulation in the light most favorable to the veteran effectively denies judicial review of nearly all prior unappealed Agency decisions. This interpretation conflicts with the recent Congressional action to create 38 U.S.C. §§ 5109A and 7111 which allow veterans to collaterally attack **all** prior unappealed decisions of the Department of Veterans Affairs. As stated **supra**, the Federal Circuit has a **limited**, but vital role in judicial review of veteran claims in that it can only review matters of constitutional, statutory and regulatory interpretation. The Federal Circuit's limited jurisdiction over constitutional, statutory and regulatory interpretation is illustrated by the fact that although the CAVC has issued over 10,000 opinions since its inception in 1988, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). If appeal to the Federal Circuit does not raise a constitutional question, a question as to interpretation of constitutional or statutory provision or a question as to a regulation's validity relied upon by the CAVC, the Court is required to dismiss the appeal for lack of jurisdiction. *See, Albun v. Brown*, 9 F.3d 1528 (Fed. Cir. 1992).

The Federal Circuit's failure to interpret veteran benefits laws in the veteran's favor nullifies the mandates of their jurisdictional statute in the context of veterans benefits laws. Meaning, that the Federal Circuit's refusal to interpret the provision in the veteran's favor resulted in the provision, 38 C.F.R. § 3.105(a), being construed in the government's favor and against the veteran. In essence,

allowing the Department of Veteran Affairs to return to the state of "splendid isolation" it enjoyed prior to the enactment of the Veterans Judicial Review Act.

Clearly, this Court's mandatory canons of statutory construction, as they apply to veteran benefits laws are premised on Congress' intent to create a uniquely benevolent statutory scheme in which veterans are afforded the benefit of the doubt on every issue, including statutory and regulatory interpretation. Compliance with these canons of statutory construction also further establish the vitality of the Federal Circuit's role in veteran benefits law.

For years, veterans were denied the right to judicial review of VA determinations. In essence, the VA was allowed to dictate statutory interpretation without the oversight afforded by judicial review. In 1988, Congress determined that the VA would be no longer entitled to enjoy the era of splendid isolation and created the CAVC to entertain questions of fact and law. To further ensure that the veteran was afforded utmost protection when it came to issues of statutory and regulatory interpretation, Congress mandated that the Federal Circuit review CAVC decisions limited to constitutional questions and issues of statutory and regulatory interpretation. This Court's recognition of Congressional intent as requiring that veteran benefit statutes be interpreted in the veteran's favor is therefore essential in light of the VA's historical freedom from judicial review.

Thus, the Federal Circuit performs two very important functions. First, it acts to provide statutory and regulatory interpretation. Second, the Federal Circuit ensures

that the veteran benefit statutes and regulations are interpreted in the veteran's favor.

As such, the Federal Circuit's consistent failure to always construe the provision at issue in the veteran's favor must be rectified because such a failure has a wide reaching effect of dispensing with Congressional mandate for the Federal Circuit's relationship to veteran benefits laws and undermines Congressional intent in creating this "uniquely benevolent" adjudication system. In addition, it allows the Federal Circuit to essentially ignore the dictates of this Court, which is especially outrageous in light of this Court's limited holdings on the canons of construction of veterans benefits laws. As such, it is imperative for this Court to intervene to ensure that this Court's holdings in *King* and *Gardner* are complied with and properly applied by the Federal Circuit in interpreting veterans statutes and regulations.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals for the Federal Circuit

98-7069

TRINIDAD G. BUSTOS,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,
Secretary of Veterans Affairs,

Respondent-Appellee.

Kenneth M. Carpenter, Carpenter, Chartered, Topeka, Kansas, argued, for claimant-appellant.

Domenique Kirchner, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued, for respondent-appellee. With her on the brief were *David M. Cohen,* Director, and *Jeanne E. Davidson,* Deputy Director. Of counsel on the brief were *Richard J. Hipolit,* Deputy Assistant General Counsel, and *Kerwin E. Miller,* Staff Attorney, Department of Veterans Affairs, Washington, DC.

Appealed from: United States Court of Appeals for Veterans Claims

Judge Donald L. Ivers

United States Court of Appeals for the Federal Circuit

98-7069

TRINIDAD G. BUSTOS,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,
Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: June 16, 1999

Before NEWMAN, SCHALL, and GAJARSA, *Circuit Judges*.

GAJARSA, *Circuit Judge*.

DECISION

Mr. Trinidad G. Bustos appeals the April 1, 1998 decision of the United States Court of Appeals for Veterans Claims,[1] No. 96-1567, affirming the decision of the Board of Veterans' Appeals (the "Board"), which denied

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[1] On March 1, 1999 the name of the United States Court of Veterans Appeals was changed to the United States Court of Appeals for Veterans Claims pursuant to the enactment of the Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, sec. 511, 112 Stat. 3315, 3341 (1998). We refer throughout this opinion to the court by its new name even though at the time of the proceedings and order here reviewed, it was not yet so named.

his claim of clear and unmistakable error ("CUE") in a prior rating decision. We affirm.

BACKGROUND

Mr. Bustos served on active duty with the Army from October 1969 to August 1972. In 1986, Mr. Bustos submitted a claim for post-traumatic stress disorder ("PTSD"). In a June 1986 regional office ("RO") decision, he was denied service connection for PTSD. Because of his prior history of drug and alcohol abuse, he was also denied service connection for alcohol and substance abuse. Mr. Bustos was subsequently treated for PTSD and alcohol abuse during the summer of 1987. He was hospitalized several times from July 1987 to February 1988 and was diagnosed with PTSD, alcohol dependence, and poly-substance abuse. An April 1988 treatment record indicated that he had received intensive treatment for PTSD. In a June 29, 1988 rating decision, he was granted a noncompensable rating for service connection for PTSD effective 1984. However, he was denied service connection for alcohol and substance abuse.

In 1990, Mr. Bustos attempted to re-open his claim. The RO granted him a 30% disability rating for PTSD, but continued to deny service connection for alcohol and substance abuse. Eventually, he received a 100% disability rating for PTSD, but was never granted service connection for his alcohol and substance abuse. Mr. Bustos contended that there was CUE in the June 29, 1988 RO rating decision because the RO failed to consider entitlement to service connection for drug and alcohol abuse as secondary to PTSD. On September 26, 1996, the Board of

Veterans' Appeals determined that there was no CUE in that rating decision.

The Court of Appeals for Veterans Claims affirmed the decision of the Board. The court explained that, even if the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error is not CUE. The court also stated that a claim of CUE based on a previous adjudication's improper weighing of the evidence cannot meet the criteria for CUE. In applying these standards to Mr. Bustos' case, the court considered his argument that the RO and the Board had not specifically discussed evidence which existed at the time of the 1988 rating decision. The court held that, even if the evidence cited by Mr. Bustos had been considered, it would merely put the totality of the evidence in equipoise; it would not "manifestly change" the result of the rating decision. Thus, because the error would not have "manifestly changed" the outcome of his original rating decision, Mr. Bustos had not demonstrated CUE with respect to the 1988 rating decision. Mr. Bustos appeals.

DISCUSSION

A. Standard of Review

Our review of decisions of the Court of Appeals for Veterans Claims is limited. Under 38 U.S.C. § 7292(c), we have the exclusive jurisdiction to "review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [section 7292], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." We have the authority to decide all relevant questions of law

and can set aside a regulation or an interpretation of a regulation relied upon by the Court of Appeals for Veterans Claims when we find it to be arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observance of procedure required by law. *See* 38 U.S.C. § 7292(d)(1) (1994). Except to the extent that an appeal presents a constitutional issue, we may not review a challenge to a factual determination or a challenge to a law or regulation as applied to the facts of a particular case. *See* 38 U.S.C. § 7292(d)(2) (1994).

B. Analysis

Generally, ratings decisions by the Department of Veterans Affairs are deemed "final and binding . . . as to conclusions based on the evidence on file at the time the VA issues written notification" of a decision. 38 C.F.R. § 3.104(a). An exception to this rule is found in another regulation that allows a prior final decision to be reopened when there is CUE. That regulation provides:

> Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of *clear and unmistakable error.* Where evidence establishes such error, the prior decision will be reversed or amended.

38 C.F.R. § 3.105(a) (emphasis added). A claim of CUE is therefore a collateral attack on a final RO decision.

The Court of Appeals for Veterans Claims has interpreted this regulation to require that a final RO decision be re-opened only when the claimed error, had it not been made, "would have manifestly changed the outcome at the time it was made." *Russell v. Principi*, 3 Vet. App. 310, 313 (1992); *see also Fugo v. Brown*, 6 Vet. App. 40, 43-44 (1993). On appeal to our court, Mr. Bustos' sole argument is that the Court of Appeals for Veterans Claims' interpretation of CUE in § 3.105 is erroneous. Mr. Bustos argues that an error may be clear and unmistakable regardless of its effect on the outcome of a case. In addition, he argues that the "manifestly different outcome" standard is too stringent. A ratings decision, according to Mr. Bustos, should be revised when correction of a clear error "might possibly change the outcome" and when the error "seriously affects the fairness, integrity, or public reputation of the proceedings." Mr. Bustos thus focuses his appeal solely on the standard for determining the existence of CUE.

The government argues that the Court of Appeals for Veterans Claims correctly construed CUE in the regulation to require re-opening of prior decisions only when the veteran shows that the error was outcome-determinative. According to the government, errors that are harmless cannot serve as the basis for a collateral attack to reopen a final judgment. As further support, the government cites to the legislative history underlying the 1997 enactment of 38 U.S.C. §§ 5109A and 7111 in which Congress codified the right to seek RO adjudication of CUE and created the right to claim CUE with respect to Board decisions. This legislative history cites favorably to the Court of Appeals for Veterans Claims' interpretation

of the CUE standard. Further, the government argues that the Court of Appeals for Veterans Claims' interpretation of CUE in § 3.105(a) is consistent with the other provisions in § 3.105. We agree with the government.

The requirement that CUE must be outcome-determinative is consistent with the other provisions in § 3.105. This regulation states that prior decisions based on CUE will be "reversed or amended" and contemplates that such reversals and amendments will have a dispositive impact on the outcomes of the prior decisions. For example, § 3.105(a) provides that, when new benefits are authorized as a result of a finding of CUE, the benefits will be made effective as of the date of the reversed decision. *See* 38 C.F.R. § 3.105(a) ("For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision."). The regulation then provides the procedure for reducing the benefits granted as a result of CUE. *See* 38 C.F.R. § 3.105(a) ("Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of an administrative error or error in judgment, the provisions of § 3.500(b)(2) will apply."). The regulation does not discuss amendments of prior decisions because of CUE when there is no dispositive impact on the ultimate outcome.

In addition, as this court has stated previously, 38 U.S.C. § 5109A made no change to the substantive standards governing modifications of RO decisions because of CUE. *See Donovan v. West*, 158 F.3d 1377, 1382-83 (Fed.

Cir. 1998). This statutory provision merely codified 38 C.F.R § 3.105 and the Court of Appeals for Veterans Claims' long standing interpretation of CUE. *See id.*; S. Rep. No. 105-157, at 3-5, 8 (1997); H.R. Rep. No. 105-52, at 2-3 (1997). Such codification of CUE by Congress lends further support to the argument that the Court of Appeals for Veterans Claims' interpretation of CUE was an appropriate reflection of how Congress intended the veterans' benefits scheme to function.

Given that the other provisions in § 3.105 contemplate that CUE be outcome-determinative and the fact that 38 U.S.C. § 5109A codified this regulation and the long standing interpretation of CUE, we cannot say that the Court of Appeals for Veterans Claims' interpretation of CUE is arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or without observance of procedure required by law. *See* 38 U.S.C. § 7292(d) (1994). We therefore hold that, to prove the existence of CUE as set forth in § 3.105(a), the claimant must show that an outcome-determinative error occurred, that is, an error that would manifestly change the outcome of a prior decision.

CONCLUSION

In view of the foregoing, the decision of the Court of Appeals for Veterans Claims is

AFFIRMED.

COSTS

Each party to bear its own costs.

QUESTIONS AND ANSWERS ABOUT PETITIONS FOR REHEARING AND SUGGESTIONS FOR HEARING OR REHEARING IN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Q. When is a petition for rehearing appropriate?

A. Petitions for rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for rehearing is not appropriate. A petition for rehearing should not be used to reargue matters already briefed and orally argued. If you failed to persuade the court then, you do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R. 36, as a disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance.

Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for rehearing to be appropriate. In addition, counsel seeking rehearing by the panel must be able to identify in the court's opinion a material error of fact or law the correction of which would require a different judgment on appeal.

Q. When is a suggestion for for [sic] *rehearing in banc appropriate?*

A. In-banc decisions are extraordinary occurrences. Consequently, to answer this question, one must first understand the respective roles of a three-judge merits panel of the court and the court in banc. The responsibility of a merits panel is to decide individual appeals according to the law of the circuit as established in the court's precedential opinions. While each merits panel is empowered to enter precedential opinions, the ultimate responsibility of the court in banc is to set forth the law of the circuit which merits panels are obliged to follow.

Thus, as a usual prerequisite, a merits panel of the court must have entered a precedential opinion in support of its judgment for a suggestion for rehearing in banc to be appropriate. In addition, the party seeking rehearing in banc must show that either the merits panel has failed to follow identifiable decisions of the Supreme Court of the United States or precedential opinions of the circuit or the merits panel has followed circuit precedent which the party seeks to have overruled by the court in banc.

Q. How frequently are petitions for rehearing granted by merits panels or suggestions for rehearing in banc accepted by the court in banc?

A. The data about petitions for rehearing since 1982 show that merits panels granted some relief in only 3 percent of the more than 1900 petitions filed. The relief

granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision. In-banc suggestions were accepted less frequently, only 16 of more than 1100 times.

Historically, the court itself insisted in-banc review in more than half (21 of 37) of the very few appeals decided in banc since 1982. This sua sponte, in banc review is a by-product of the court's practice of circulating every precedential panel decision to all of the judges before it is published. No count is kept of sua sponte, in banc polls that fail to carry, but one of the reasons that virtually all of the more than 1100 suggestions made by the parties since 1982 have been declined is that the court itself has already impliedly "cleared" the precedential opinions before they are filed by merits panels.

Q. *Is it necessary to have filed either a petition for rehearing or a suggestion for rehearing in banc before filing a petition for certiorari in the Supreme Court of the United States?*

A. No. All that is needed is a final judgment in the court of appeals.

As a matter of interest, very few petitions for certiorari from Federal Circuit decisions are granted. Since 1982, the Supreme Court has granted certiorari in only 31 appeals heard in the Federal Circuit. Almost 1000 petitions for certiorari have been filed in that period.

APPENDIX 2

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 96-1567

TRINIDAD G. BUSTOS, APPELLANT,

V.

TOGO D. WEST, JR.,
ACTING SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before IVERS, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

IVERS, *Judge:* The appellant appeals a September 26, 1996, decision of the Board of Veterans' Appeals (BVA or Board) which denied his claim of clear and unmistakable error (CUE) in a June 29, 1988, rating decision which denied service connection for substance and alcohol abuse. Both parties filed briefs. The Court has jurisdiction of the case under 38 U.S.C. § 7252(a). For the reasons stated below, the Court will affirm the decision of the BVA.

I. FACTS

The veteran served on active duty from October 1969 to August 1972. Record (R.) at 60. An October 1969 report of medical history completed by the veteran indicated "yes" next to "nervous trouble of any sort." R. at 21. The veteran was considered qualified for enlistment. R. at 23-24. The veteran's service medical records (SMRs) are

devoid of any treatment for or complaints of a psychological problem. R. at 26-43, 48-51. The veteran's May 1972 discharge examination did not reveal any psychiatric problems; however, in the report of medical history the veteran once again indicated "yes" next to "nervous trouble of any sort." R. at 44-47, 52-53.

In January 1986 the veteran submitted a claim for post-traumatic stress disorder (PTSD). R. at 67. A February 1986 treatment record contains the notation "[b]inge drinker [secondary to] stress." R. at 82. In a June 1986 regional office (RO) decision, the veteran was denied service connection for PTSD. The RO denied the veteran's claim because he had not responded to a request for information regarding his claimed traumatic events in service. The RO stated,

> Medical reports show him with a drinking problem since age 18 and long history of multiple substance abuse, including Heroin, Hashish, PCP and LSD. He was in Vietnam 7 months as ammo bearer and participated in one unnamed campaign. [PTSD] was ruled out in March 1986.

R. at 92. At the bottom of the decision it was noted, "Disability is the result of veteran's own willful misconduct: alcohol and substance abuse." *Id.*

VA treatment records from June to August 1987 show treatment for PTSD and alcohol abuse. R. at 101-04. The veteran was hospitalized on several occasions at VA medical centers (MC) from July 1987 to February 1988 and was diagnosed with PTSD, alcohol dependence, and polysubstance abuse. R. at 94, 96, 98, 106. The February 1988 discharge report noted that the veteran had used

alcohol to avoid nightmares and flashbacks. R. at 107; *see also* R. at 127.

An April 1988 treatment record indicated that the veteran had received intensive treatment for PTSD at the Albuquerque, New Mexico, VAMC. R. at 114. Dr. John A. Salazar opined, after counseling the veteran and conducting a review of the veteran's hospitalization reports, that the veteran suffered from PTSD, chronic, severe with emotional depression, complicated by a history of mixed drug abuse. R. at 117.

In a May 1988 VA psychiatric examination, the veteran was diagnosed with "[PTSD], alcohol dependence in remission, and history of polysubstance abuse in remission." R. at 129. In June 1988 Dr. Patrick Rivera indicated that he had treated the veteran in March 1983 for a drug overdose. "It was about this time that we made connections for him to begin working on his [PTSD]. He certainly showed many symptoms of this condition at that time." R. at 135. In a June 29, 1988, rating decision, the veteran was granted a noncompensable rating for service connection for PTSD, effective March 1984; however, the denial of service connection for alcohol and substance abuse was continued. R. at 138-39.

In July 1988 the veteran was hospitalized. Discharge diagnoses of "mixed substance abuse, alcohol," "sedative-hypnotic withdrawal (probable)," and a mixed personality disorder were rendered. R. at 143.

In March 1990 the veteran attempted to reopen his claim and attached a March 1990 report from a Vet Center that indicated that the veteran was severely impaired by PTSD symptoms and that this would continue for the rest

of his life. R. at 148, 151. April and May 1990 VA examinations resulted in diagnoses of severe adjustment disorder with mixed emotional features, alcohol dependency, mixed substance abuse in remission, and PTSD. R. at 163, 171. In May 1990 the veteran was hospitalized at the Wichita VAMC for recurrent major depressive disorder, ongoing PTSD, chronic alcohol dependence in remission, and borderline personality disorder traits. R. at 179, 183. A November 1990 RO decision granted a 30% disability rating for PTSD. The veteran's substance abuse was considered a disability which was the result of his own willful misconduct. R. at 190-96.

The veteran was hospitalized several times at VAMCs from February 1992 to May 1993 for acute alcohol withdrawal, chronic alcoholism, mild alcoholic gastritis, adjustment disorder with depressed mood, and a history of PTSD, chronic nicotine dependence, "rule out other drug abuse," and PTSD with depression. R. at 198, 201-03, 215-17. December 1992 and June 1993 rating decisions denied service connection for substance abuse because it was not established that it was secondary to PTSD. In addition, the June 1993 rating decision denied an increased rating for PTSD. R. at 208-13, 219-21. The veteran submitted an NOD. R. at 500.

The veteran was hospitalized several times at the Topeka VAMC from January to August 1994 for PTSD, alcohol dependence and intoxication, and depression. R. at 223-498, 503-11. Letters dated September 1994 were received from Samuel L. Bradshaw, Jr., M.D., Karen Reinke, and Juanita L. Craig. Dr. Bradshaw, Chief of Psychiatry Service at the Topeka VAMC, indicated that the veteran's alcoholism was "basically a way for [the

veteran] to cope with his PTSD" and that the veteran's hospitalization from January to March 1994 was for PTSD. R. at 513. Ms. Reinke, a VA nurse, and Ms. Craig, in a joint letter, indicated that the veteran had received alcohol treatment during his April 1994 hospitalization. R. at 514. An October 1994 rating decision denied an increased rating for PTSD and denied service connection for alcohol dependence as secondary to PTSD. R. at 517-19.

In October 1994 the veteran submitted claims for an increased disability rating for PTSD, individual unemployability (IU), total and permanent disability pursuant to 38 C.F.R. § 3.40; service connection for drug and alcohol abuse secondary to PTSD; and alleged CUE in the June 29, 1988, RO decision. R. at 523-24, 526. An October 27, 1994, rating decision awarded a 100% rating for PTSD, effective May 1992 and stated, "The allegation of [CUE] in [r]ating decision 6-29-88 is not considered to be a valid claim." R. at 533. The veteran submitted a substantive appeal contending there was CUE in the June 29, 1988, RO decision. R. at 564.

In February 1995 the veteran submitted an affidavit regarding his employment history. R. at 568-71. Records from the Topeka VAMC from August 1994 to January 1995 show that the veteran received treatment for unrelated ailments, but did not attend several therapy sessions for his PTSD and depression. R. at 573-88.

In February 1995 a Topeka VAMC hospitalization report from September 1994 was received which showed diagnoses of PTSD, depression secondary to PTSD, and a history of alcoholism, currently recovering. R. at 590-94.

The examiner, Dr. John Pope, stated, "It is my sense that he will never be permanently disabled from his depression and PTSD, but that he [will] continue to have partial ongoing disability related to his PTSD." R. at 593.

In February 1995 a VA social worker noted, "He has been moderately disabled economically due to his alcoholism. He hasn't been sober very long in the last several years to assess what extent the PTSD symptoms affect his employability." R. at 596. The veteran also underwent a PTSD examination that resulted in diagnoses of PTSD, chronic, severe, and alcohol dependence, secondary to PTSD. R. at 605. In a March 20, 1995, rating decision, the veteran's 100% disability rating for PTSD was confirmed and continued. R. at 610-11.

A February 1995 VA medical report was received that revealed that the veteran was struggling with issues related to PTSD. In addition, it was noted that he needed treatment for his alcohol and drug abuse. R. at 614. In a March 31, 1995, rating decision, the veteran's PTSD rating of 100% was continued. R. at 618-19.

In July 1996 the veteran submitted additional argument, contending that there was CUE in the June 29, 1988, RO decision in that the RO failed to consider entitlement to a total disability evaluation based on IU and entitlement to service connection for drug and alcohol abuse as secondary to PTSD. R. at 634-58. On September 26, 1996, the BVA determined that there was no CUE in the June 29, 1988, RO decision which denied service connection for substance and alcohol abuse. R. at 11.

II. ANALYSIS

Section 3.105(a) of title 38, Code of Federal Regulations, provides:

> Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of [CUE]. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of [CUE] has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a) (1997). A claim of CUE is a collateral attack on a final RO decision. *Crippen v. Brown*, 9 Vet.App. 412, 417-18 (1996); *Smith (William) v. Brown*, 35 F.3d 1516, 1521 (Fed.Cir. 1994); *Duran v. Brown*, 7 Vet.App. 216, 224 (1994). The CUE review authority in 38 C.F.R. § 3.105(a) relates only to review of decisions of the agency of original jurisdiction (RO). *See Smith*, 35 F.3d at 1527. However, a claim for CUE in a BVA decision is now allowed. Pub. L. No. 105-111, 111 Stat. 2271 (1997) (found at 38 U.S.C. § 7111). The Court has defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied. . . . [CUE] is the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said

> that reasonable minds could only conclude that the original decision was fatally flawed.

Crippen, 9 Vet.App. at 418; *Russell v. Principi*, 3 Vet.App. 310, 313 (1992) (en banc).

In *Fugo v. Brown*, 6 Vet.App. 40, 43-44 (1993), this Court stated, "[E]ven where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, ipso facto, clear and unmistakable." *See also Russell, supra.* Furthermore, a claim of CUE on the basis that previous adjudications had improperly weighed the evidence can never meet the stringent definition of CUE. *Russell, supra.* The veteran's representative correctly noted an omission in both the RO and BVA decisions, i.e., that they did not discuss the specific evidence which existed at the time of the June 1988 rating decision. Appellant's Brief at 10. The veteran's representative points to several pieces of evidence that were in existence at the time of the June 1988 rating decision and argues that, had they been considered the result would have been different. The evidence includes a February 1986 notation of "binge drinker [secondary to] stress" (R. at 82), and that the veteran drank alcohol to avoid nightmares and flashbacks (R. at 107, 127). The Court notes that, even if the evidence had been reviewed and a nexus established between the veteran's PTSD and drug and alcohol abuse, there was additional evidence of record suggesting that there was no causal relationship between PTSD and drug and alcohol abuse. Specifically, it was reported that the veteran had had a drinking problem since the age of eighteen and had a "long history of multiple substance abuse, including Heroin, Hashish, PCP and LSD." R. at 92. The most the

veteran can hope to accomplished [sic] by his argument is to put the evidence in equipoise. However, by definition, that would not change the result. *See Crippen* and *Russell*, both *supra* ("[CUE] is the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed"). The veteran has not shown this sort of error – that it is "absolutely clear that a different result would have ensued" had the BVA considered this evidence. *Fugo, supra; see also Russell, supra.* Therefore, the June 29, 1988, rating decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 38 U.S.C. § 7261.

The veteran also argues that the BVA erred when it referred the veteran's IU claim to the RO for further action rather than remanding it; however, the veteran's representative has not provided any precedential authority for this proposition. In *Godfrey*, this Court established that when a claim has not been adjudicated by the RO, and no SOC is issued as to that claim, the BVA should refer the claim to the RO for adjudication because the claim was not in appellate status. *Godfrey v. Brown*, 7 Vet.App. 398, 409 (1995). Therefore, the BVA acted properly when it referred the veteran's claim back to the RO for consideration.

III. CONCLUSION

Upon consideration of the record, the Secretary's motion for summary affirmance, and the appellant's

brief, the Court holds that the appellant has not demonstrated that the BVA committed either factual or legal error which would warrant reversal or remand. The Court is also satisfied that the BVA decision meets the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). Summary disposition is appropriate under *Frankel v. Derwinski*, 1 Vet.App. 23 (1990). Therefore, the Secretary's motion for summary affirmance is granted and the September 26, 1996, decision of the BVA is AFFIRMED.

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